No. 2956.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

POWER AND IRRIGATION COMPANY OF CLEAR LAKE (a Corporation),

Plaintiff in Error,

vs.

HEINZ SPRINGE,

Defendant in Error.

Syllabus of Points of Law Made in the Oral Argument of Charles S. Wheeler, for Plaintiff in Error.

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Attorneys for Plaintiff in Error.

Filed this.....day of October, A. D. 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

The James H. Barry Co.
San Francisco

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SYLLABUS OF POINTS OF LAW MADE IN THE ORAL ARGUMENT OF CHARLES S. WHEELER, FOR PLAINTIFF IN ERROR.

The following propositions afford the juridical basis for plaintiff's case. An understanding of them is therefore essential to a proper consideration of the question of *res adjudicata* which is the ultimate question of law in the case:

(a) When a vendee has entered into possession under an executory contract of purchase, and the vendor is unable to comply with his covenant to furnish a good title, and the vendee fails to make the payments required by the contract, both parties are in default and therefore neither can recover *on the con-*

tract against the other without first fulfilling his obligations thereunder.

3 *Elliott on Contracts,* Sec. 2098.

(b) When the vendee has entered into possession under the contract he has no right to remain indefinitely in possession unless he is willing to pay in full and to accept a deed conveying whatever title the vendor has to give.

Gervaise v. *Brookins,* 156 Cal., 103;
Haile v. *Smith,* 128 Cal., 415.

But in such cases—*both parties being in default*—either can elect to treat the contract as rescinded and recover from the other—not on the contract, but on an implied promise—whatever he has given to the other in part performance.

Glock v. *Howard etc. Co.,* 123 Cal., 10 and 16;
Cleary v. *Folger,* 84 Cal., 316;
Phelps v. *Brown,* 95 Cal., 572.

(c) Notwithstanding the vendor's own default in the matter of title, the vendee by retaining possession and by failing to pay up, is regarded in law as holding out to the vendor a continuing offer to rescind and abandon the contract; and the vendor, if he so elects, may demand possession and sue in ejectment to recover the land. Such demand for possession followed

by a suit in ejectment operates in law as an acceptance of the vendee's implied offer to abandon and rescind.

Thus it is said in *Hicks* v. *Lovell,* 64 Cal., 21:

> "'The refusal of one party to perform his contract,' says the Supreme Court of New York, in *Graves* v. *White,* 87 N. Y., 465, 'amounts on his part to an abandonment of it.' . . . In the present case such refusal was proved. The defendant undertook to repudiate the contract and at the same time held the possession under and by virtue of it. . . . the plaintiff . . . had the right to bring ejectment to recover back his land. In so doing, and in giving the preliminary notice to surrender possession, **he, too, gave his assent to the abandonment of the contract; and the parties who made it having thus by mutual assent rescinded it, its validity was gone and it ceased to exist. Neither party, thereafter, could invoke its terms or protection as against the other.**"

(d) Such abandonment and rescission as the above quotation shows need not be express; but it may just as well be evidenced by the acts and conduct of the parties.

See also:

Gwin v. *Calegaris,* 139 Cal., 390-1;
Drew v. *Pedlar,* 87 Cal., 443;
Carter v. *Fox,* 11 Cal. App., 67;
Lewis v. *White,* 16 Ohio St., 444;
Parsons on Contracts, p. 678 (9th Ed.).

In the case at bar Springe was in default in failing to furnish a merchantable title, while Brown's default arose solely from the fact that he failed to make the

final payment and insisted on remaining in possession nevertheless.

It follows that since both parties were in default either of them could rescind the contract at any time.

Glock v. *Howard etc. Co.,* 123 Cal., 1, at p. 16.

Applying the principle of mutual defaults, Brown's conduct was in law a continuing offer to abandon and rescind. So also Springe's failure to make the title good was in law likewise a continuing offer on his part to abandon and rescind. Either could acquiesce in the offer of the other. Springe by electing to demand possession and sue in ejectment gave his consent to Brown's offer and from that moment the abandonment and rescission was complete.

Prentice v. *Erskine,* 164 Cal., 450;
Hicks v. *Lowell, supra*;
Gwin v. *Calegaris,* 139 Cal., 390-1.

(e) When a contract of purchase and sale is abandoned and rescinded by the mutual consent of the parties the law makes it the duty of each party to surrender to the other all that he has received under the contract.

California Civil Code, Sec. 1716;
Heilig v. *Parlin,* 134 Cal., 99, and cases cited.

The rule as to the right of a vendee upon abandonment or rescission of the contract to recover back

his payments, extends even to cases where the vendee alone is in default and the vendor is not in default at all, but is nevertheless, generous enough to give his assent by word or act to a rescission or abandonment.

Shively v. *Semi-Tropic L. & W. Co.,* 99 Cal., 259;
Glock v. *Howard etc. Co.,* 123 Cal., 1.

If in assenting to such rescission, nothing is said by the parties on the subject of a return of money payments, the law implies an agreement that they shall be returned to the vendee.

Law Credit Co. v. *Tibbitts,* 160 Cal., 629.

(f) It was Brown's duty from the time that Springe demanded a surrender of the possession of the premises to yield up such possession to Springe; and it was Springe's duty to return to Brown the moneys received by Springe under the contract, together with a sum equal to the value of Brown's improvements, less the fair rental value of the use and occupation of the premises.

Garvey v. *Lashells,* 151 Cal., 531;
Haile v. *Smith,* 128 Cal., 419.

(g) The law, under the foregoing circumstances, favors the vendor only to this extent: He may sue in ejectment without first tendering back to the vendee the cash received and the value of the vendee's im-

provements; but the vendee is not permitted to recover his money payments and outlays until he has first surrendered possession voluntarily to the vendor, or until he has been evicted from the premises.

Haile v. *Smith, supra,* and cases cited;
Rhorer v. *Bila,* 83 Cal., 55.

(h) If the vendor sues in ejectment the vendee cannot defend the action upon the ground that the vendor's title is not good.

Gervaise v. *Brookins,* 156 Cal., 103.

(i) Nor will that fact together with the fact that he has made large payments and erected valuable improvements constitute a defense.

Gervaise v. *Brookins,* 156 Cal., 103;
Burnett v. *Caldwell,* 9 Wallace (U. S.), 293.

(j) Nor can the vendee file a cross-complaint and so recover in the ejectment suit his money payments and outlays.

Hoffman v. *Remnant,* 72 Cal., 1;
Glide v. *Kayser,* 142 Cal., 420.

(k) The law permits the vendor who is himself in default to recover from the vendee the value of the use and occupation from and after the time that he demands possession.

Hannan v. *McNickle,* 82 Cal., 127.

This relief, together with the recovery of possession, is the whole measure of the rights of a vendor who cannot or does not make his title good. Assuredly a vendor who is himself in default cannot forfeit the vendee's payments and outlays merely because the vendee does not surrender possession forthwith upon his demand.

The law does not favor forfeitures and it is enough if the vendee voluntarily surrenders possession at any time before he sues the vendor to recover the money he has paid on the contract.

And even if the vendee does not surrender possession voluntarily the result is the same; for it is enough that a vendee has been evicted from possession prior to suing to recover his payments and outlays.

Rhorer v. *Bila,* 83 Cal., 55.

All that the law requires is that the vendor is in fact back in possession, before vendee brings his suit.

The foregoing propositions are conclusive in the case at bar; for

(1) It appears that Brown surrendered possession while the action of ejectment was still pending (*California Code of Civil Procedure,* Sec. 1049), without moving for a new trial or taking an appeal. He did not require the vendor to take out a writ or call in the sheriff (Tr., p. 150). In fact, both parties seem to have acted very agreeably about the matter, and the actual surrender of possession at the last was by

agreement (Tr., p. 151). The surrender was therefore a voluntary one.

But even if the surrender, because made while the suit was pending, is to be treated as an eviction of Brown, he nevertheless could sue after such eviction to recover his payments and outlays.

Rhorer v. *Bila,* 83 Cal., 55.

(m) But for Brown's possession of the premises the case would be identical in principle with the recent case of *Allen* v. *Chatfield,* 172 Cal., 60. When the vendor tendered a deed, Allen, the vendee, shrugged his shoulders and said that he "didn't have the money to give the vendor." Allen sued to recover the $5000 he had paid under the contract. The court held that Allen was entitled to recover the amount, saying of the vendor (p. 69): "Every principle of justice demands that he should return it." This was because the title of the vendor was not good.

There the possession had not passed to Allen, while here Brown was in possession.

But is there any reason for not holding here, just as was held in the case of *Allen* v. *Chatfield,* that every principle of right and justice demands that Springe should return this money?

At the worst, Springe—the man who had not made good the title and who was himself in default—had been out of possession for less than six months after his demand. Brown had made a total outlay of more

than $50,000 on account of a piece of land for which he had agreed to pay but $47,000. Why should he forfeit this amount to Springe when Springe's title was bad and the value of the use and occupation during the detention could readily be ascertained and Springe have credit for the full measure thereof?

(n) Not only does the general conception in cases of this character call for a restoration to the vendee of the purchase money, and the value of the improvements, but the hardships to which any other rule would lead is well illustrated by the facts in the case at bar; for

The Court knows judicially that the latter half of the year 1907 was one of financial panic. Money could not be obtained even upon "gilt edge" securities and by the last of October the entire country was on a clearing house certificate basis. For months the Governor of this State declared successive legal holidays, and the very day on which Springe last offered a deed to Brown was a legal holiday.

S. F. "Recorder," Vol. 14, Nos. 139-150;
Poheim v. *Meyers,* 98 Pac., 66.

To hold that Springe could purge himself of his own default by thus tendering a deed sufficient in form to convey his defective title to Brown, and to permit him to have back the land and to retain the $50,000 in money and the improvements is shocking

to the conscience and would exalt an imaginary "rule of the game" at the expense of justice; for such a rule would mean that if the defaulting vendee hastens to restore possession before the defaulting vendor sues in ejectment, he may have back his payments and outlays; but that the vendor by sprinting to the Clerk's office and filing a suit before the vendee vacates the property, can forfeit those payments.

Even so-called "rules of the game" are not so absurd and unjust, and that is why we call it an "imaginary" rule.

(o) Counsel have devoted so much space to a discussion of the question of the date at which Brown was in default for failure to make the final payment under the contract that it might be thought to have some bearing upon the legal situation of the parties. But the date is utterly unimportant. The material thing is that both parties were in default at the date when Springe demanded possession and filed his ejectment suit. The defendant in error strenuously claims that Brown was bound to make the final payment on September 15th, 1907. We, on the other hand, think that the extension agreement of September 12, 1907 (Tr., p. 141), set the time for final payment at large. But be that as it may, the facts remain that Brown was in possession under the contract at the time when Springe tendered him a deed sufficient in form to convey whatever title Springe had, and that at the time of such tender Springe demanded the final pay-

ment, which Brown failed to make (Tr., p. 94). ~~But~~ In either event Brown, like Springe, was in default. Brown failed to make his payments under the contract, and still retained possession, and that is all that is necessary to the discussion.

(p) The vendee's election to have a specific performance of the contract did not operate as a waiver of his objections to the title.

The authorities render the retention by the defendant in error of these moneys, so inexcusable that his counsel are forced to desperate measures. They iterate and reiterate the assertion that the vendee, pursuant to the contract, had three options, if the title proved defective, viz.: to have specific performance *or* to extend Springe's time to cure the defects *or* to abandon the contract and take back his money (Brief, pp. 12, 13, 6).

In short, Springe's counsel are driven to the remarkable contention that the vendee was not given an election to require specific performance of the contract, which election should be coupled with an extension of Springe's time in which to remove the specific objections to the title. While undoubtedly there is an ellipsis in the paragraph of the contract which refers to the rights of the vendor should the title not be cured within the ninety days given by the contract (Tr., p. 12); yet obviously said ellipsis must be supplied by the word "and" and not by the word "or."

The ellipsis does not create an ambiguity, for there is no hard and fast rule either of interpretation or of

grammar which would compel the court to supply the word *"or"* rather than the word *"and";* while on the other hand it appears on the face of the contract that the only word that could be supplied with due regard to good sense is the word "and." The vendee is entitled to elect to have a specific performance, not of a part, but of the whole contract. The contract required the vendor to furnish a merchantable title and to clear up the title if it is not merchantable, and to deliver a deed conveying good title concurrently with the final payment. It would therefore be absurd to say that the contract could be performed specifically if Springe was not prepared to furnish a merchantable title.

But even if there had been an ambiguity, the doubt has been resolved against Springe by the interpretation put upon the contract by the parties themselves, as the court will find by reading the letter of the vendee to Springe's attorney dated March 18, 1907 (Tr., p. 125), and also the letter of Springe's attorney in response thereto, dated April 16, 1907 (Tr , p. 128).

(q) In a further effort to stem the current of authority defendant in error urges that there was no rescission because there was no return or offer to return the personal property referred to in the contract. But it is obvious that the portion of the contract which concerns the personalty is entirely independent of and separable from the provisions for the sale of the realty. The contract is not entire. It expressly

declared that the $8000 which was payable, and which in fact was paid on the 15th day of December, 1906, was the full purchase price of said personal property (Tr., p. 13). The mere fact that $53,000 is recited in an earlier part of the contract as the total purchase price of the land and personalty is of no consequence whatever.

Field v. *Austin,* 131 Cal., 383.

But if it were otherwise—if the contract were so indivisible that it could not be rescinded by the act of one of the parties alone unless the rescission was *in toto*—this case would not be affected thereby; for a contract may always be abandoned or rescinded or altered or modified in part by the mutual consent of the parties.

California Civil Code, Secs. 1691, 1698.

And such mutual consent, as we have seen, need not be expressed, but it may be implied from the conduct of the parties.

Here the conduct of both the parties was such that the law imputes to them a mutual consent to let the contract stand so far as concerns the personalty, and to mutually abandon so much of the contract as related to the land.

It is only when a rescission is not affected by mutual acquiescence or consent that a restoration or offer to restore what has been received is essential.

California Civil Code, Sec. 1691.

(r) The rule permitting the forfeiture of partial payments in cases where the law permits it, is harsh enough, particularly where the payments and outlays of the vendee have been large.

Why should a court wish to make the situation one whit easier than it already is for greedy vendors?

Take the case at bar. When the entire country was in the throes of a financial panic and money had been superseded by clearing house certificates and loans were not obtainable even upon the highest class of securities, Springe, who had himself failed to live up to the contract, desired to obtain a forfeiture of the moneys already received by him and take back his lands as well. But the law exacted, before it would give him his pound of flesh, that he first cure his title and then tender a deed. If he had done this and then the vendee refused to pay, Springe could have retained both the land and the money. But he could not legally keep it otherwise. In short, if there is no performance by the vendor—if he is himself in default—the law will never permit him to claim a forfeiture of the vendee's payments. It will permit him to rescind, abandon and restore, but not to forfeit.

If instead of placing himself in a position to perform the contract, Springe saw fit to demand and recover the possession from the vendee by suit in ejectment the law stamps his conduct as a consent to the rescission and abandonment of the contract and de-

mands that he return the consideration which he has received, including the value of the improvements placed by the vendee on his lands. Is this not just? Is it not sound morality as well as sound law?

THE JUDGMENT IN EJECTMENT IS NOT A BAR TO THE RIGHT TO RECOVER BACK THE PURCHASE MONEY.

A few considerations should make this entirely clear. *First:* both parties were in default:

(a) Springe's failure to comply with his contract consisted in this; that his title was not originally good nor had it been made good. Brown's default arose from the fact that he had not made the final payment but nevertheless remained in possession of the lands despite the fact that final payment had been demanded and a deed tendered sufficient in form to convey him such title as Springe had. While Springe, upon Brown's default, could treat the contract as abandoned and recover in ejectment, he could not have specific performance, nor could he sue Brown for breach of the contract. Brown, on the other hand, was estopped from showing in the ejectment suit that Springe was in default because Brown had received possession from Springe and therefore could not dispute his vendor's title.

Cases *supra.*

Brown, in other words, could neither plead Springe's want of title as a defense in the action of

ejectment nor could he by means of a cross-complaint setting forth Springe's want of title recover his payments and outlays under the contract. How then can a judgment in ejectment bar the right to recover on the claim?

Cases *supra.*

(b) The judgment does not mean that Springe had a good title, nor that he was not himself in default. Brown's position was identical with that of the defendant in *Haile* v. *Smith,* 128 Cal., 415, where the Supreme Court of California said of Smith:

> "He received possession of the land from respondent under the contract, and can retain possession only by fulfilling his covenants which he therein made. He cannot keep both the land and the purchase money. It is not necessary, therefore, for the purpose of this case, to determine definitely whether or not respondent has a good and sufficient title. . . if he concluded not to comply because the title was not satisfactory to him, he was bound to restore possession to the respondent. **Whatever cause of action he may have for the purchase money which he paid and for the value of his improvements is another matter**; it constitutes no defense to the present action."

(c) Not only does the foregoing decision indicate that the judgment in ejectment is no bar, but the same conclusion follows from the fact that Brown could have no cause of action until a surrender of the premises had been made to Springe. Had he asserted his claim before the possession was surrendered it would have been premature.

Cases *supra.*

Is it not absurd to suppose the judgment in ejectment is a bar to Brown's right to recover on a claim which he could not under any circumstances assert in an ejectment suit?

(d) We have seen that both upon authority and on principle the judgment in ejectment should not be held to be a bar to this particular action.

But our adversaries say that issues were tendered and findings made in the ejectment suit which cover the very matters involved in this litigation. We are unable to find any such issues or findings. There is no finding whatever that Springe had a merchantable record title to the property. Nor is there any finding that Springe was not in default. Without such issues the vital questions before the court in the case at bar would be wholly wanting. But even if there had been such issues tendered, and if they had been expressly found upon, even then they would not have been "actually *and* necessarily" included in the judgment or "necessary thereto," within the meaning of Section 1911 of the Code of Civil Procedure of California.

These matters were wholly immaterial; for upon the admissions in the answer itself, plaintiff was entitled to judgment for possession. The only facts and issues essential to uphold the judgment are: (1) that defendant is in possession under the contract to purchase which he pleads; (2) that the final payment is

past due; and (3) that the vendee has not made the final payment, but still holds possession.

These are the only facts essential to the judgment. Everything else that is alleged is unnecessary and immaterial. All other facts even if in issue and found upon would not estop Brown from litigating the same matter again.

The language of Section 1911 of the Code of Civil Procedure of California is but an embodiment of the general law on this precise point.

In a very able opinion dealing with the doctrine of *res adjudicata* the United States Circuit Court of Appeals for the Second Circuit, in *Langdon* v. *Clark,* 221 Fed. Reporter, 841, said, quoting from a New York case:

> "'The rule, with its qualifications, is very well stated in the brief of the learned counsel for the appellant in this action, as follows: "A judgment does not operate as an estoppel in a subsequent action between the parties as to immaterial or unessential facts, even though put in issue by the pleadings and directly decided. But it is final as to every fact litigated and decided therein, having such a relation to the issue that its determination was necessary to the determination of the issue."'"

* * * *

And again:

> "The plaintiffs in the first action asserted title to the whole lake, and it might be thought that the trial court was fully justified in entering the judgment which it did. But we must remember the principle laid down by the New York Court of Appeals in *House* v. *Lockwood, supra,* that a judgment does not operate as an estoppel as to imma-

terial or unessential facts even though put in issue by the pleadings and directly decided."

* * * *

"'To render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined—that is, **that the verdict in the suit could not have been rendered without deciding that matter**; or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter.'"

It follows that in the case at bar the judgment in ejectment was not an estoppel; and that the trial court was therefore in error in granting a nonsuit.

Respectfully submitted.

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